IN THE

Supreme Court of the United States

October Term, 1962

No. 118

BANTAM BOOKS, INC., DELL PUBLISHING COMPANY, INC., POCKET BOOKS, INC., and THE NEW AMERICAN LIBRARY OF WORLD LITERATURE, INC.,

Appellants,

—v.—

JOSEPH A. SULLIVAN, ABRAHAM CHILL, EDWARD H. FLANNERY, HOWARD C. OLSEN, DAVID COUGHLIN, JOSEPH LEONELLI, OMER A. SUTHERLAND, DR. CHARLES GOODMAN and EUSTACE T. PLIAKAS, in their capacities as Members of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH and ALBERT MCALOON, in his capacity as Executive Secretary of the RHODE ISLAND COMMISSION TO ENCOURAGE MORALITY IN YOUTH,

Appellees.

APPEAL FROM THE SUPERIOR COURT OF RHODE ISLAND

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS AMICUS CURIAE

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BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS AMICUS CURIAE

The Interest of the Authors League

The Authors League of America, Inc. is an organization of professional writers and dramatists. One of its principal purposes is to express the views of its members in controversies involving rights of free press and free speech. Because the determination of this appeal may significantly affect those fundamental rights, The Authors League (with the consent of the parties) respectfully submits this brief.

ARGUMENT

The Authors League files this brief in support of the appeal by Bantam Books, Inc. et al. from the decision of the Supreme Court of Rhode Island upholding Resolution No. 73 because it believes that the Resolution establishes a method of restricting the distribution of books that is utterly repugnant to the First Amendment and a serious threat to the rights of free speech and free press.

We respectfully submit that, as appellants contend, Rhode Island's Resolution No. 73 is unconstitutional because it restrains the distribution of all books (obscene and non-obscene) that are condemned by the Commission,* through the threat that dealers who sell the proscribed publications will be prosecuted.

Moreover, even if the Commission's pronouncements and activities did not convey (explicitly and implicitly) the threat of prosecution, the Resolution violates the First Amendment because: (i) It imposes a restraint on the distribution of books by attempting to indirectly eliminate the element of *scienter* from Rhode Island's obscenity laws and (ii) the publication and distribution of the Commission's lists is, *per se*, a restraint on free speech prohibited by the First Amendment.

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* Rhode Island Commission to Encourage Morality in Youth.

I.

Resolution No. 73 is unconstitutional because it seeks indirectly to remove the requirement of *scienter* from Rhode Island's obscenity statutes.

There is no question that the preparation and publication of the Commission's lists was the direct consequence of the Legislature's mandate, expressed in Resolution No. 73. The Commission's task is not to educate on the general subject of obscenity or to uplift the standards of literature. On the contrary, under the explicit command of the Resolution its "duty" is "to educate the public concerning any book" (i.e. specific book) that it judges to contain obscene language in violation of the State's criminal obscenity laws (and to recommend prosecution of violations of the laws). "Education" is used in the sense of publicly identifying and labelling any such book.

The Resolution thus necessarily required that the Commission perform its assigned duty by distributing to booksellers and wholesalers lists of (or otherwise publicizing) the books that it decides contain matter prohibited by the State's obscenity laws. Under the Resolution, moreover, the Commission has unlimited power to list a book, although it had not previously been adjudicated obscene by a Court, in a trial complying with the requirements of due process.

The publication of the Commission's lists has the same effect as did that provision of the California statute struck down in *Smith* v. *California*, 361 U. S. 147, which failed to require *scienter* as an element of California's criminal obscenity laws.

In *Smith* v. *California* the Court ruled the statute unconstitutional because a restraint would be imposed upon the distribution of books if booksellers could be held responsible under the obscenity laws although they had no personal knowledge that an offending book was obscene. The Court declared:

> "For if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature" (at p. 153).

Resolution No. 73 attempts to accomplish the same purpose as the California statute—traveling a slightly different path. It is apparent that the Resolution is intended as a device for placing booksellers on notice as to the "obscene" content of works on the Commission's list, thus seeking to establish their knowledge of the book's obscenity for any subsequent prosecution under the Rhode Island criminal obscenity laws.

That the Supreme Court of Rhode Island understood that the purpose of the Resolution, and its lists, was thus to give the bookseller "some advance notice" of the "character" of the books he distributes, "before criminal proceedings are commenced against him", is indicated by the following statement from its opinion:

> "Ordinarily a distributor or bookseller is not expected to know the character of all the books he distributes. It is only fair that he should be given some advance notice of which he may avail himself, if he chooses, before criminal proceedings are com-

> menced against him. It is in that context we interpret the action of the commission here and the willing response thereto of the distributor (Tr. 134).
>
> • • • • •
>
> "When as in the case at bar, steps are taken to save the local distributor from embroilment in criminal proceedings the petitioning publishers come forward protesting that the commission is depriving them of their constitutional right of freedom of the press" (Tr. 135).

The statement of this Court in *Smith* v. *California*, quoted above, is applicable to the Rhode Island statute. If a Rhode Island bookseller may be charged in a criminal proceeding with knowledge that a book was obscene because it had previously been listed on the Commission's index, he will "tend to restrict the books he sells" to those which are not listed by the Commission; and Rhode Island thus:

> "will have imposed a restriction on the distribution of constitutionally protected as well as obscene literature."

The fact that the State might not ultimately be permitted to rely on the Commission's list to establish *scienter* in a criminal trial would not lessen the restrictive effect of the threat that the presumption could be invoked; any more than the fact that the California statute could not be upheld in actual application lessened its restrictive effect until it was declared unconstitutional. Faced with the possibility that he will be held to "know" that any book on the list is obscene, the bookseller will impose that "self-censorship" which this Court observed in *Smith* v. *California*,

supra, was a "censorship affecting the whole public, hardly less virulent for being privately administered."

One evil of devices such as the Rhode Island Commission's list is that they are aimed at the bookseller who is a vital factor in the distribution of books; and yet one whose "timidity" in the face of possible prosecution makes him most sensitive to these restrictive measures. An individual bookseller cannot afford the cost of defending himself against charges of obscenity as to one, or a few, of the hundreds of books he sells (or the risk of jail or fine, if his judgment is wrong). His stake in these books is too small. His only and natural choice, when the State adopts measures which increase the likelihood of his conviction—whether by eliminating *scienter*, or creating a presumption of *scienter*, is to discontinue selling any book that is under suspicion; and certainly any book placed on an "official" index issued by a State agency.

Such forms of restraint as the Commission's lists are insidious because they are elusive. The publisher of a proscribed book cannot meet or answer the State's effort at restraint because it is not open and direct, as it would be in a prosecution under the obscenity laws or in a proceeding for an injunction. And, the lists can be used with deadly effect by the police and prosecuting officials in surreptitious campaigns to suppress the sale of books.

II.

A State may not condemn particular books as obscene, by legislative or administrative pronouncement.

We respectfully submit that even without explicit or implicit threats of prosecution—Resolution No. 73 is in direct violation of the First Amendment to the Constitution.

(i) In *Joint Anti-Fascist Refugee Committee* v. *McGrath, Attorney General et al.*, 341 U. S. 123, Mr. Justice Black said:

> "More fundamentally, however, in my judgment the executive has no constitutional authority, with or without a hearing, officially to prepare and publish the lists challenged by petitioners. In the first place, the system adopted effectively punishes many organizations and their members merely because of this political beliefs and utterances, and to this extent smacks of a most evil type of censorship. This cannot be reconciled with the First Amendment as I interpret it. See my dissent in *American Communications Assn.* v. *Douds*, 339 U. S. 382, 445. Moreover, officially prepared and proclaimed governmental blacklists possess almost every quality of bills of attainder, the use of which was from the beginning forbidden to both national and state governments. U. S. Const., Art. I, §§ 9, 10" (pp. 143-144).

We submit that these objections apply with greatest force, when, as here, the State extends such a method directly to books and speech, as such.

Rhode Island has reached back in time to select one of the favorite and most effective devices of censorship—the index of objectionable books. The primary and obvious purpose of such lists has always been to prevent the public from reading them. If a State, or the Federal Government, can take such action with respect to books that have not been convicted of obscenity, and are therefore protected by the First Amendment, there is no reason why it cannot apply the same device to books objectionable on any ground—whether they deal with sex in an unacceptable manner, or with unorthodox political ideas, or the theory of Evolution. To permit the State to adopt this repressive measure is not simply to leave the "door barring federal and state intrusion * * * ajar", but to remove it completely from its hinges.

(ii) Undoubtedly the publication of official lists of proscribed books by the State, or its agencies, will, without any accompanying threat of prosecution, limit the distribution of any book thus cited. Booksellers would refuse to sell it. And, it is obvious that many individuals will give full credence to such an official condemnation of a book, and not read it. Criticisms of a book, or requests not to read it, by a private religious, social or educational organization are protected by the First Amendment; and are part of the "give-and-take" which is envisaged by the concept of free speech. But there is a vast difference between private opinion and governmental opinion. The First Amendment did not envisage, nor does it protect, official criticism by the State or any effort on its part to discourage its citizens from reading particular books.

The public can recognize that criticism of a book by a private group represents only its viewpoint—and that there are others. Publishers or others defending the book can meet such criticism on the same level of authority. No one of these views has any greater sanction than another in our pluralistic society. But when criticism and condemnation emanate officially from the Government, there is no "give-and-take". And it would be unrealistic to assume that any response from individuals or private groups carries with it equal weight of authority. History teaches too clearly that the pronouncement of "official" criticisms or condemnations of speech by a State inevitably produces orthodoxy and conformity of viewpoint that are inimical to free speech.

(iii) Mr. Justice Frankfurter in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath* also said:

> "This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society" (at p. 168).

The official lists published by authority of Resolution No. 73 condemn the cited books as violations of the State's obscenity laws and thus identify their publishers as individuals (or concerns) engaged in practices made criminal by these laws. This action is taken without notice, hearing or compliance with the other requirements of due process.

Even more, as appellants contend, the Commission's action is tantamount to a finding of obscenity—by methods other than judicial determination. We submit that appellants are correct in their contention that the determination of obscenity can only be made by a court. The rights of free speech and press would be sharply curtailed if the trial of the issue of obscenity could be shifted from the courts to administrative agencies.

As appellants urge, the issue of whether a book is obscene necessarily involves a constitutional question; it determines whether the First Amendment will or will not protect the author, publishers and seller of the challenged work. And, the question must necessarily be determined by applying the rules of law and construction established by this Court. We respectfully submit that a reading of recent decisions, both in the federal and state courts, makes it only too clear that the application of those rules can only be entrusted to a Court, and if the question could be determined in the first instance by Commissions or other bodies composed of laymen, that the right of free press and speech would not be as zealously guarded and publishers, booksellers and authors could not be assured of the protection of these rights until they had, by appeal, reached the courts and the sanctuary of proper judicial determination of the term "obscene". The cost of meeting the challenge on this basis—community by community, state by state is so overwhelming, that a given book could be effectively suppressed in many states without a Court even determining the issue.

III.

Resolution No. 73, and the activities of the Commission it established, impose an unconstitutional restraint on the distribution of books, grounded on an implicit threat of criminal prosecution.

Undoubtedly the Commission's official index of objectionable works conveyed to book dealers the threat that persons selling these titles would be subject to criminal prosecution. An official pronouncement from a State agency that it had found the book "objectionable" or "obscene" it would naturally carry that connotation to the average reader. And, certainly any bookseller reading the text of the Resolution (and the Commission thoughtfully distributed copies) would conclude that the penalty for ignoring the Commission's lists was criminal prosecution, since Resolution No. 73 couples in one paragraph a direction to the Commission to "educate the public concerning any book" containing obscene language as defined in various sections of Rhode Island's criminal obscenity law and a command "to investigate and recommend prosecution of all violations" of these sections.

The Supreme Court of Rhode Island recognized that the basic purpose of the Resolution was to restrain the circulation of books condemned by the Commission. It said that if the publisher's

> "publication on the bookseller's shelf is obscene, he is the real offender and it is his offense which resolution No. 73 seeks to discover and prosecute" (Tr. 135).

Moreover, as appellants' brief amply demonstrates, the Commission by correspondence, publicity and the activi-

ties of police officials conveyed the very forceful and direct threat that retailers who continued to sell the books proscribed on its lists would be prosecuted (Appellants' Brief, pp. 8-14, 20-22).

CONCLUSION

It is respectfully submitted that the Resolution No. 73 of the Rhode Island General Assembly should be declared unconstitutional.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., Amicus Curiae
120 Broadway
New York 5, N. Y.

Certificate of Counsel

I hereby certify that I am counsel for the amicus curiae The Authors League of America, Inc. and that the foregoing brief in support of the appeal is in my opinion well founded in law and fact and is proper to be filed herein and is presented in good faith and not for delay.

Respectfully submitted,

IRWIN KARP
Attorney for The Authors League of America, Inc., Amicus Curiae
120 Broadway
New York 5, N. Y.

Letters of Consent

(Letterhead of)

STATE OF RHODE ISLAND
DEPARTMENT OF THE ATTORNEY GENERAL
July 30, 1962

Irwin Karp, Esquire
Hays, St. John, Abramson & Heilbron
120 Broadway
New York 5, N. Y.

Re: Bantam Books Inc. et al vs. Rhode Island Commission to Encourage Morality in Youth.
Supreme Court of the United States—October Term No. 118

Dear Mr. Karp:

We have no objection to filing a brief *amicus curiae* by counsel for Authors' League of America, Inc., in the above-captioned matter. In this assent or consent to such filing, we intend no trespass upon the right of the Court to select *amici* as it sees fit. And our assent or consent to filing a brief *amicus curiae* do not reflect any view of ours as to the importance of the "issues involved".

Very truly yours,

/s/ J. JOSEPH NUGENT
J. JOSEPH NUGENT,
Attorney General

cbc

(Letterhead of)

WEIL, GOTSHAL & MANGES

August 2, 1962

Irwin Karp, Esq.,
Hays, St. John, Abramson & Heilbron, Esqs.,
120 Broadway,
New York 5, N. Y.

Re: Bantam Books, Inc. et al v. Rhode Island Commission on Youth—Supreme Court of the United States—October Term 1962, No. 118

Dear Mr. Karp:

This is in response to your letter of July 19th in which you, as counsel to the Authors League of America, Inc., request my consent to the filing of a brief *amicus curiae* in the Supreme Court of the United States by the Authors League in support of the position of Bantam Books, Inc., et al.

I hereby consent to such filing and authorize you to use this letter in advising the Court that I have granted such consent.

Very truly yours,

/s/ HORACE S. MANGES

HSM:HW

(Letterhead of)

ABEDON, MICHAELSON AND STANZLER

July 23, 1962

Hays, St. John, Abramson & Heilbron
120 Broadway
New York 5, New York

Re: Bantam Books, Inc. et al v. Rhode Island Commission on Youth—Supreme Court of the United States—October Term, No. 118

Attention: Irwin Karp

Gentlemen:

I herewith consent to the Authors League of America filing the Brief Amicus Curiae in the above-entitled matter which will be heard before the Supreme Court of the United States in the October term.

You may use this letter to advise the Court of my consent.

Very truly yours,

/s/ MILTON STANZLER
Milton Stanzler

MS:ca